Nos. 77-452, 77-457, and 77-5

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In the Supreme Court of the United States

OCTOBER TERM, 1977

MOBIL ALASKA PIPELINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

EXXON PIPELINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

BP PIPELINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL PARTIES IN OPPOSITION

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No. 77-452

MOBIL ALASKA PIPELINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 77-457

EXXON PIPELINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 77-551

BP PIPELINES, INC., PETITIONER

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UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL PARTIES IN OPPOSITION

At issue in this case is the validity of an order of the Interstate Commerce Commission that (1) suspended for seven months the operation of tariffs filed by petitioners stating new rates for the transportation of crude oil through the Trans Alaska Pipeline System, (2) instituted an investigation into the lawfulness of the rates contained in the suspended tariffs, and (3) authorized petitioners to file tariffs stating reduced interim rates for the suspension period.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission had authority under Section 15(7) of the Interstate Commerce Act to suspend for seven months the operation of an initial schedule stating a new rate for the interstate transportation of crude oil by pipeline.

2. Whether the Commission had authority to allow interim rates for such transportation to go into effect during the suspension period and to announce in advance the maximum interim rate level it would be willing to accept without suspension.

3. Whether the Commission had authority to condition its acceptance of a carrier's interim rate filing without suspension on the carrier's agreement to refund the portion of any charges it collects in excess ~~to~~ of what may later be found, after a full hearing pursuant to Section 15(1) of the Act, to be the just and reasonable rate level.

STATEMENT

1. The background of this case was succinctly stated by the court of appeals (Pet. App. A-3 to A-5; footnotes omitted):[1]

> This controversy arose on the eve of the flow of crude oil through the Trans Alaska Pipeline System (TAPS) which stretches from oil fields in Alaska's North Slope at Prudhoe Bay to Valdez, Alaska, some 800 miles distant. The pipeline was constructed by the Alyeska Pipeline Service Corporation, an agent for its eight owners.[2]

[1]Except where otherwise noted, "Pet. App." refers to the appendix to the petition in No. 77-452.

[2]Petitioners Mobil Alaska Pipeline Company, Exxon Pipeline Company, and BP Pipelines, Inc., respectively own 5 percent, 20 percent, and 15.84 percent of the pipeline system (Pet. App. A-3 to A-4, n. 3). Petitioners are affiliates or subsidiaries of corporations engaged in the production of oil in the north Alaskan fields; petitioner Mobil Alaska Pipeline Company, for example, is a subsidiary of Mobil Oil Corporation, which owns 2 percent of the oil being produced in those fields (No. 77-452, Pet. 5 and n. 3).

> Between May 27, 1977 and June 15, 1977, seven TAPS owners [including petitioners] filed * * * [initial rate] tariffs [for the carriage of crude petroleum over the pipeline system] * * *. Protests [and petitions for suspension of the tariffs] were filed by the Department of Justice, the State of Alaska, the Arctic Slope Regional Corporation, and the * * * Bureau of Investigation and Enforcement [of the Interstate Commerce Commission]. The Commission heard oral argument on June 27, 1977 without making any formal evidentiary record.

2. On the day after the hearing, the Commission entered an order instituting an investigation of the lawfulness of the proposed rates pursuant to Section 15(1) and (7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(1) and (7), and suspending the rates pending the investigation for the statutory period of seven months pursuant to Section 15(7), without prejudice to the filing of interim rates during the suspension period (Pet. App. C-1 to C-27).

The Commission explained its decision to institute an investigation as follows (Pet. App. C-2 to C-4):

> In order for a rate to be lawful, a primary requirement is that it be just and reasonable * * *. * * *
>
> Protestants contend that the filed rates would provide excessive profits, whether compared with a traditional rate of return on valuation or with the carriers' capital costs. * * *
>
> * * * * *

> * * * [W]hile there may be merit to the carriers' contentions that the standards used by protestants do not cover their true costs of capital, this is a matter that cannot be resolved until a more complete record is developed. Finally, evidentiary hearings will be necessary to develop acceptable cost data for use in applying whatever measures of reasonableness are found to be appropriate. * * *

The Commission determined that its power to suspend "any schedule stating a new individual or joint rate, fare, or charge" (Section 15(7) of the Act) extended to initial rates such as those before it (Pet. App. C-4 to C-5). The Commission noted that "the maintenance of excessively high rates could act as an obstacle to the use of the pipeline by non-affiliated oil producers, and would also delay the [native] Alaskan interests in obtaining revenues that depend upon the wellhead price of the oil" (Pet. App. C-5), and it concluded that in these circumstances, especially in view of the protestants' showing of the probable unlawfulness of the rates, suspension was preferable to the alternative of a later refund of excessive charges (*ibid.*).

However, in order to permit the pipeline owners to commence operation of the pipeline prior to the expiration of the seven-month suspension period, which they could not do otherwise (Section 6(7) of the Act, 49 U.S.C. 6(7)), the Commission authorized them to file lower interim rate tariffs and, basing its determination on the cost data supplied by the pipeline owners themselves, indicated the maximum interim rates that it would accept without suspension (Pet. App. C-5 to C-16).

3. Petitioners and other affected pipeline owners filed petitions for review in the United States Court of Appeals for the Fifth Circuit, seeking injunctive relief against the

suspension of their initial rate tariffs. The court of appeals, with one judge dissenting, dismissed the petitions (Pet. App. A-1 to A-25). The court determined, on the basis of the language of Section 15(7), the legislative policy underlying the statute, and a comparison of that statute with other statutes conferring authority to suspend rates, that the Commission had power to suspend initial rate tariffs (Pet. App. A-10 to A-12). The court further concluded that the Commission "as [a] corollary to its suspension power had the power to set out allowable rate ceilings for the seven-month period which, if filed, it would not suspend" (Pet. App. A-15). Accordingly, the court denied "[a]ll motions for stay, suspension, injunction and other forms of interlocutory relief" (Pet. App. A-16) and dismissed the petitions.

4. Each petitioner thereafter filed interim rate tariffs with the Commission and commenced pipeline operations (No. 77-452, Pet. 11-12; No. 77-457, Appl. 4; No. 77-551, Pet. 6).

5. On October 20, 1977, this Court stayed the Commission's suspension order pending final disposition of the petitions for a writ of certiorari. The stay was conditioned upon petitioners' agreement to keep account of charges collected during the pendency of the stay and to refund any portion of such charges that they are ultimately found to have not been entitled to collect.

ARGUMENT

1. Petitioners Mobil Alaska and BP, but not petitioner Exxon, contend that the Commission has no authority under Section 15(7) of the Act to suspend the operation of initial, as opposed to changed, rate schedules. This contention was correctly rejected by the Commission and the court of appeals and does not warrant review by this Court.

Section 15(7) provides that "[w]henever there shall be filed with the Commission *any* schedule stating a *new* * * * *rate, fare, or charge*, * * * the Commission * * * may from time to time suspend the operation of such schedule and defer the use of such rate, fare, [or] charge, * * * but not for a longer period than seven months beyond the time when it would otherwise go into effect" (emphasis added). The Commission itself has long interpreted the phrase "new rate" in Section 15(7) as comprehending "both changed and initial" rates. *Rail-Water, Grain in Bulk, Mo., Ill., and Ind. to Buffalo*, 321 I.C.C. 564, 566. As this Court often has had occasion to state, "great deference [is due] to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16.

The Commission's interpretation, moreover, is fully supported by comparison of Section 15(7) with other provisions of the statute. The court of appeals correctly stated (Pet. App. A-11 to A-12):

> Section 15(7) has served as the prototype of other agency rate suspension provisions in the Interstate Commerce Act and in other regulatory acts as well. In many of these acts, when Congress has wished to exclude initial rates, either in part or across the board, it has done so in specific language. In the Interstate Commerce Act itself, there are provisions modeled on 49 U.S.C.A. §15(7) giving the ICC authority to suspend new rates, proposed by motor carriers, 49 U.S.C.A. §316(g), by water carriers, 49 U.S.C.A. §907(g)(i), and by freight forwarders, 49 U.S.C.A. §1006(e). Each of these provisions contains a grandfather clause exempting certain initial rates from suspension. If initial rates were not covered there would have been no need for the grandfather clauses. Another example is 49 U.S.C.A. §1482(g),

> which gives the Civil Aeronautics Board suspension powers similar to those granted to the ICC with one significant difference: it specifically provides that "[t]his subsection shall not apply to any initial tariff filed by any air carrier." Thus, we conclude that if Congress had wished to exempt initial tariffs from the purview of §15(7) it would have done so specifically, and that Congress' omission to specially exempt initial rates in this section indicates its intent that initial rates be subject to the ICC's §15(7) suspension powers.

This reading of the statute also is supported by consideration of the legislative policy underlying the statutory scheme. Were the Commission powerless to suspend an initial rate filing, as petitioners contend, a carrier serving a new market would be free to set and collect even outrageously excessive rates without interference from the Commission until after a potentially lengthy investigatory proceeding. Section 15(7) was designed to protect the public *during* the investigatory proceeding from the dangers of probably unlawful carrier-imposed rates. There is no basis for imputing to Congress an intention to strip the public of that protection with respect to initial rates, where the need may be greatest. On the contrary, Section 1(5) of the Act, 49 U.S.C. 1(5), provides that "[*a*]*ll* charges * * * shall be just and reasonable, and *every* unjust and unreasonable charge * * * is prohibited and declared to be unlawful" (emphasis added). That overriding congressional policy weighs heavily against the novel statutory interpretation that petitioners advance. The court of appeals correctly summarized (Pet. App. A-12):

> Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need

for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.[1]

Finally, in view of the fact that this case apparently represents the first time in the long history of the Interstate Commerce Act that the Commission's power to suspend initial rates under Section 15(7) has been challenged, the issue can hardly be said to be a recurring

[1]Petitioners' reliance on the Federal Power Commission's interpretation of the analogous provisions of the Federal Power Act and Natural Gas Act also is misplaced. Although the suspension authority conferred by those statutes is similar to that conferred by Section 15(7) of the Interstate Commerce Act, the differences are critical. Section 15(7) gives the Interstate Commerce Commission authority to suspend the operation of "*any* schedule stating a new * * * rate" (emphasis added). By contrast, Section 205(e) of the Federal Power Act, as added, 49 Stat. 852, 16 U.S.C. 824d(e), and Section 4(e) of the Natural Gas Act, 52 Stat. 823, as amended, 15 U.S.C. 717c(e), gave the Federal Power Commission authority to suspend "any such new schedule." The phrase "such new schedule" in each of the latter provisions refers to an immediately preceding subsection, which provides that no change may be made in any rate except upon 30 days' notice, to "be given by filing * * * *new schedules* stating plainly the change or changes to be made in the schedule or schedules then in force" (emphasis added). Section 205(d), 16 U.S.C. 824d(d); Section 4(d), 15 U.S.C. 717c(d).

The fact that the text of the Federal Power Act and the Natural Gas Act support the Federal Power Commission's interpretation of those statutes does not detract in any way from the deference owed to the Interstate Commerce Commission's interpretation of different language in a different statute. The Interstate Commerce Act contains no provision giving to the phrase "any schedule stating a new * * * rate" (49 U.S.C. 15(7)) a meaning equivalent to that given by the Federal Power and Natural Gas Acts to the phrase "new schedule." Cf. 49 U.S.C. 6(3). As this Court noted in *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 353, "[t]ranslation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

matter of substantial importance warranting review on certiorari. In this connection, it should be noted that as of October 1, 1977, jurisdiction under the Interstate Commerce Act over the transportation of oil by pipeline has been transferred from the Interstate Commerce Commission to the Federal Energy Regulatory Commission. See Section 306 of the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 581; Executive Order 12009, 42 Fed. Reg. 46267.

2. If, as we have argued, the Commission's suspension of petitioners' initial rate tariffs was lawful, petitioners were barred from commencing operations as common carriers during the seven-month suspension period unless and until they filed new rate tariffs. See Section 6(7) of the Act. After the court of appeals dismissed their suits for review of the suspension order, petitioners filed interim rate tariffs, which the Commission permitted to go into effect, and petitioners began operating the pipeline.

Petitioners apparently do not contend that the Commission has no power to permit interim rates to go into effect.[4] Petitioners argue, however, that it was improper

[4]Indeed, petitioners would have no standing to make such a contention. They were not harmed by the Commission's acceptance of their interim tariffs. To the contrary, petitioners' decisions to file such tariffs reflected their individual determinations that it would be more profitable to operate at lower interim rates than not to operate during the suspension period at all. Petitioners could not be heard to challenge the lawfulness of agency action of which they are the beneficiaries.

In any event, the Commission correctly explained its power to accept interim rates (Pet. App. C-6 to C-7):

> We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier

for the Commission to have announced, in its suspension order, the maximum interim rates it would be willing to accept without suspension.

Petitioners' contention is answered by this Court's decision in *United States* v. *Chesapeake & Ohio R. Co.*, 426 U.S. 500. In that case, as here, the Commission had suspended one set of rate tariffs but had authorized the filing of another, somewhat less favorable to the carriers, that would become effective without prior investigation and hearing. See 426 U.S. at 503-504. This Court firmly sustained that practice as "a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation." 426 U.S. at 514. That determination governs this case as well. The Commission's decision to authorize interim rates here, like its authorization in *Chesapeake & Ohio* of new railroad tariffs with conditions specifying the manner in which additional revenues would be expended, represented a "measured course * * * offer[ing] an alternative tailored far more precisely to the particular circumstances presented." *Ibid.* See also *In re North American Light & Power Co.*, 170 F. 2d 924, 930-931 (C.A. 3).

This Court's decision in *Chesapeake & Ohio* also disposes of petitioners' contention that the Commission's indication of the maximum interim rates it would accept constituted an improper prescription of rates without a prior hearing. Petitioners confuse the prescription of rates, which is the final approval of rates as lawful after a hearing held pursuant to Section 15(1) of the Act, with

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operations altogether. We do not believe that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest.

the acceptance of a rate tariff, without a prior hearing but subject to a subsequent determination of lawfulness. The Commission's acceptance of petitioners' interim rate tariffs plainly was not a determination of the lawfulness of the rates set forth in those tariffs. To the contrary, the lawfulness of petitioners' rates will only be determined after investigation and hearing. The acceptance of rate tariffs pending a subsequent determination of lawfulness need not itself be preceded by a hearing. See Sections 6(1) and 15(7) of the Act. The fact that the tariffs accepted by the Commission were not of petitioners' first choosing does not alter the matter; as in *Chesapeake & Ohio*, the Commission had authority to suspend one tariff and accept another without a prior hearing, subject to the protections offered by a subsequent hearing on the question of the lawfulness of the carriers' rates.

The Commission's announcement of the maximum interim rates it would be willing to accept without suspension not only was legitimate and reasonable, but also served the convenience both of petitioners and the other affected pipeline owners and of the general public. In the absence of such an announcement, petitioners still would have been required to file interim rate tariffs in order to commence operations, but they would not have known what level of interim rates would be acceptable. Petitioners would have been forced to file consecutive interim rate tariffs, each being subject to suspension by the Commission, until they reached an acceptable figure (which might actually be lower than the maximum the Commission would have been willing to accept). Meanwhile, the pipeline would have lain idle, with the consequence that all revenues would have been denied to petitioners and critically needed energy supplies to the nation. There is no logic to such a result; the statute does not require, nor could Congress have intended, so

ponderous a procedure. The Commission properly obviated the necessity of such a procedure by indicating in advance the interim rates it was willing to permit.

Petitioners contend that the decision below conflicts with *Moss* v. *Civil Aeronautics Board*, 430 F. 2d 891 (C.A.D.C.). But since the cases arose under separate and different regulatory schemes, there can be no conflict in the strict sense. Moreover, insofar as the decision in *Moss* purports to place general limitations on a regulatory agency's ability to use its suspension power to induce the filing of a modified rate tariff, it must be viewed as having been overruled by this Court's subsequent decision in *Chesapeake & Ohio*. Accordingly, there is no reason to believe that the court that decided *Moss* would extend the reasoning of that case to the provisions of the Interstate Commerce Act involved here and in *Chesapeake & Ohio*.

In any event, the evil that concerned the court in *Moss* is not present here. In *Moss* the court suspected that a regulatory agency had connived, in *ex parte* meetings with members of the regulated industry, to implement a significant revision of the agency's overall practices with respect to the setting of permanent rates in a manner that would effectively insulate those rates from any judicial inquiry into their lawfulness. See 430 F. 2d at 893-894, 900-902. In contrast, in this case there is no suggestion that the interest of the public has been subordinated to that of the regulated industry as a result of *ex parte* dealings; only temporary rates have been authorized, and once permanent rates are fixed they will be subject to unhindered judicial review. These facts would not invoke the *Moss* doctrine, which serves only to "extend[] judicial power where an agency is using the suspension authority so as to avoid or limit the judicial review provided by Congress * * *." *Continental Air Lines, Inc.* v. *Civil Aeronautics Board*, 522 F. 2d 107, 131 (C.A.D.C.) (Leventhal, J., concurring).

3. The Commission recognized that "even the lower interim rate levels may prove upon investigation to exceed reasonable levels" (No. 77-457, Pet. App. 30a). It therefore conditioned its willingness to accept the filing of interim rate schedules without suspension on a "require[ment] that the carriers keep account of the amounts collected under the interim rates or the proposed rates should they become effective[5] and that they agree to refund any portion of such amounts that may ultimately be established as excessive" (*ibid.*).

Petitioners argue that the imposition of such a refund condition exceeds the Commission's power because the statute does not authorize the Commission to enter refund orders with respect to initial rates. The court of appeals, relying on this Court's decision in *Chesapeake & Ohio*, correctly rejected this contention (Pet. App. A-16):

> With respect to this exercise of power for the seven-month period, like the power to suggest the interim rates themselves, we find this is a valid corollary to the suspension power, which we lack jurisdiction to review. * * * We are less certain of the Commission's power to require the carriers to establish refund provisions with respect to the originally filed rates. However, we view this exercise of power as corollary to the power to suspend. Thus, insofar as the Commission's order reaches beyond the seven-month period, we are guided by *Chessie*, where the condition upheld by the Supreme Court was permanent.

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[5]As the court of appeals noted, "if the Commission does not complete its investigation within seven months from the date of its suspension Order, the carriers' originally filed rates automatically go into effect" (Pet. App. A-15 to A-16, n. 15).

The Commission did not assert the power to impose a condition unrelated to the purpose of a suspension order. On the contrary, refund conditions, like suspension itself, are designed to protect the public from the injury that results when a carrier charges unreasonably high rates. The refund condition imposed by the Commission here, no less than the condition upheld by this Court in *Chesapeake & Ohio*, which specified the manner in which certain revenues must be expended, is a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation" (426 U.S. at 514).

Moreover, a self-executing refund requirement is particularly appropriate in the circumstances of this case, where the shippers are in large part affiliated with the carriers and where the persons directly affected by unreasonably high rates include the holders of royalty interests.[6] In the absence of a refund requirement, the carrier-affiliated shippers might have little incentive to initiate separate reparations actions against the carriers with which they are affiliated, since the effect of reparations payments would be to divert revenues from the affiliated companies to holders of royalty interests. The Commission's refund condition was thus "tailored * * * precisely to the particular circumstances presented." *United States* v. *Chesapeake & Ohio R. Co., supra*, 426 U.S. at 514.

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[6]"Since the price of oil, as delivered at refineries in the lower 48 states, is fixed in relation to world oil prices, the value at the wellhead is in inverse relation to the cost of pipeline transport" (No. 77-452, Pet. 7, n. 5). Consequently, if the transportation rates are excessive, the wellhead price is reduced and those who have royalty interests in that price suffer diminished revenues. Both the State of Alaska and the Arctic Slope Regional Corporation (which represents Alaskan natives) have royalty interests in the wellhead value of North Slope oil.

4. If, as we submit, the Commission was empowered to suspend petitioners' initial rate tariffs, to announce the maximum interim rates it would accept without suspension, and to impose a refund condition on its acceptance of such interim rates without suspension, that is the end of the matter. The courts have no jurisdiction to review the correctness of the Commission's determination that rates in excess of the interim rates allowed would have been probably unlawful. Suspension orders under Section 15(7) are not reviewable: Congress intended to "vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief." *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, 667. See also *United States* v. *SCRAP*, 412 U.S. 669, 690-698.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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